*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%   Reserved on: 27th April, 2017
Decided on: 7th July, 2017

\+   **CRL.M.C. 3474/2016 & Crl.M.A. 14666/2016 (stay)**

SMT RANI KAPOOR ..... Petitioner
Represented by: Mr. Sermon Rawat, Mr. Shivang Rawat, Mr. Jagmeet Randhawa, Advs.

versus

M/S SILVERMOUNT ..... Respondent
Represented by:

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the petitioner seeks quashing of complaint case No. 2009/1 titled as "*M/s. Silvermount Vs. Mrs. Rani Kapoor*" wherein the petitioner has been summoned as an accused for offence punishable under Section 138 of the Negotiable Instruments Act, 1981 (in short the NI Act) by the learned Metropolitan Magistrate (West), Tis Hazari, Delhi.

2. Allegations in the complaint filed by the respondent are that it is a partnership firm carrying on business of building construction and had entered into a collaboration agreement with the petitioner for reconstruction of property No. 4/16, West Patel Nagar, New Delhi admeasuring 200 sq. yds. approximately. As per the collaboration agreement, the respondent paid a sum of ₹25 lakhs as earnest money to the petitioner and the balance amount of ₹1.5 crores in two installments. On reconstruction, respondent was entitled to keep the first and second floor with proportionate right in the

land underneath whereas the rest of the portion was to continue in the ownership of the petitioner. After execution of the agreement, the petitioner approached the respondent and requested for payment of ₹20 lakhs which in any case the respondent was to make later on, hence the same was paid. However, the petitioner with malafide intention avoided handing-over the vacant peaceful possession of the property which was required to be demolished for reconstruction. Finally the dispute was settled, petitioner agreed to repay the amount and a dissolution deed was entered into between the parties. A cheque bearing No.183141 dated 28th May, 2015 for a sum of ₹5 lakhs issued in favour of the respondents was returned as dishonoured vide memo dated 29th May, 2015 on account of 'payment stopped by drawer'. Hence on non-receipt of the payment, respondent issued a notice and filed the complaint under Section 138 NI Act as noted above.

3. Learned counsel for the petitioner submits before this Court that Section 138 NI Act envisages that when a cheque issued in lieu of a legally recoverable debt is dishonoured and on service of notice the money is not paid within 15 days, a complaint is maintainable. The only issue raised by learned counsel for the petitioner challenging issue of summons in the complaint to the petitioner is that admittedly the respondent is an unregistered partnership firm and an unregistered partnership firm is not entitled to enforce its rights through contract as per Section 69 of the Indian Partnership Act. Hence the complaint against the petitioner is not maintainable and is liable to be set aside.

4. On the issue whether an unregistered partnership firm is entitled to maintain a complaint under Section 138 NI Act different views have been expressed by various High Courts. The view expressed by the Division

Bench of Kerala High Court & Single Benches of Karnataka High Court and Punjab & Haryana High Court is that irrespective of Section 69(2) of the Indian Partnership Act, a complaint under Section 138 NI Act is maintainable whereas the view taken by the Division Bench of Andhra Pradesh High Court is that the bar under Section 69(2) of the Indian Partnership Act is also applicable to a complaint under Section 138 of the NI Act.

5. In the decision reported as AIR 1975 Ker 144 _Kerala Arecanut Stores v. Ramkishore and Sons_ it was held:

> *"10. Reference has been made to these provisions to indicate that the obligation of the drawer of a cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provisions. It is not as if there is any privity of contract between the maker of a cheque and the holder in due course. Any right of action available to such holder is not under any contract, for he would be a third party to the contract and would not come within one of the exceptions enabling a third party to a contract to sue. But he is entitled to sue on his cheque by reason of the right conferred upon him by the statute. In fact, in the case of an indorsement of a pronote or of a cheque it is not an assignment of the debt as such but only of the property in the note or the cheque and it is by virtue of obtaining such property in the note or the cheque that the indorsee sues thereon. It is not necessary to advert to the several decisions which indicate that a person suing on a negotiable instrument is not suing by virtue of the assignment of the debt. That, we think, is well settled and therefore we are not referring to the decisions cited by counsel on this point. It is sufficient to state here, for the purpose of this case, that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the indorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a*

suit by the indorsee to enforce a right arising out of a contract and therefore the bar under Section 69(2) of the Partnership Act will not operate in such a case."

6. Following the decision of the Supreme Court in <u>*BSI Ltd. Vs. Gift Holdings Pvt. Ltd*</u>. in the decision reported as ILR 2003 KAR 4325 <u>*Beacon Industries v. Anupam Ghosh*</u> it was held:

"*5. A careful reading of Section 69(2) of the Partnership Act clearly shows that an unregistered partnership firm is barred from filing a civil suit and there is no bar as such to file a private complaint and it is purely criminal liability on the part of the person who has issued the cheque. Even if the cheque issued by a partner of an unregistered firm for legally recoverably debt or otherwise and if such cheque dishonoured when it was presented for encashment, it amounts to a criminal liability. Therefore the dismissal of a complaint by the Trial Court by relying on the decision of the Andhra Pradesh High Court referred to above is incorrect. Whenever a complaint is presented under Section 138 of the Negotiable Instruments Act it is the duty of the learned Magistrate to take note of the cognizance and record the sworn statement of the complainant and his witnesses and after hearing if there is any prima facie case then it is the duty of the Court to issue summons to the accused.*

6. In the case of Abdul Gafoor v. Abdur Rehman [1999 (4) Crimes 1998.] the Kerala High Court held that an unregistered firm can prosecute a complaint under Section 138 of the Negotiable Instruments Act and the effect of non-registration of a firm under Section 69 of the Partnership Act is applicable only to a case involving civil rights.

Further, the Supreme Court in the case BSI Ltd. v. Gift Holdings Pvt. Ltd [2000 SCC (Cri) 538.] has held that:

".... A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the

Negotiable Instruments Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability."

Again in the case of Gurcharan Singh v. State of U.P. [2002 (4) Crimes 165.] the Allahabad High Court has followed the above said judgment of the Supreme Court.

Therefore, in view of the above decisions of the Supreme Court as well as of the other High Courts, the contention of the respondent that filing of a criminal complaint by a partner of an unregistered firm is hit by Section 69(2) of the Partnership Act cannot be accepted. The said section has no application to the criminal cases. Under these circumstances it could be said that Section 69(2) of the Partnership Act is applicable only where the civil rights are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. Hence the finding recorded by the Trial Court is totally incorrect and illegal and the same is liable to be set aside."

7. Learned Single Judge of Punjab and Haryana High Court following the Division Bench of Kerala High Court in the decision reported as (2005) 4 RCR (Cri) 330 <u>Capital Leasing and Finance Co v. Navrattan jain</u> held-

"25. A bare reading of the above shows that Section 69(2) prohibits the enforcement of rights in respect of an unregistered firm by way of a suit. The same does not relate to a criminal complaint. In Kerala Arecanut Stores v. Ramkishore and Sons and another, AIR 1975 Kerala 144, a Division Bench of the Kerala High Court held that provisions of Section 69(2) of the Partnership Act, provide that the suit by a partner for recovery of money of a dishonoured cheque, interest in favour of the firm is not barred. The following observations in the said case are apposite :

"It is sufficient to state here for the purpose of this case that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the endorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the indorsee to enforce a right arising out a contract and therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case."

26. Besides, the Supreme Court in Haldiram Bhujiawala and another v. Anand Kumar Deepak Kumar and another, 2000 (1) Unreported Judgments 603, held that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

27. In the case in hand the complainant has a statutory claim in terms of Section 138 N.I. Act. Even otherwise Section 69 of the Partnership Act is confined to enforcement of a right arising out a contract by instituting a suit or other proceedings by an unregistered firm. The criminal complaint that has been filed cannot be treated as a suit or other proceedings to enforce any rights arising under a contract. Therefore, ***there is no bar to the criminal complaint that has been filed and the non-registration of the firm would not bar the prosecution of an accused on the ground that the firm was not registered.****"*

8. In <u>*Gowri Containers v. S.C. Shetty*</u> 2007 SCC OnLine Kar 624 : 2008 Cri LJ 498 Division Bench of Karnataka High Court held:

"9. Now coming to the contention of the respondents that in view of the provisions of Section 69(2) of the Indian Partnership Act. The amount under the transaction was not legally enforceable debt, reliance has been placed by the respondents learned advocate on a Division Bench decision of Andhra Pradesh High Court in Amit Desai v. Shine Enterprises (2000 Cr LJ 2386) wherein in respect of an unregistered partnership firm, on the ground that the suit cannot be instituted by an unregistered firm, it was held that the debt against the accused was not a legally enforceable debt. That was the case in which,

the second consignment received by the complainant could not be sold and it had been returned to the accused by dispatching through a lawyer and the accused had sent a credit note to the amount and promised to return the value of the stock returned to them. In those circumstances, the accused had issued a cheque and the complaint arose out of the dishonour of that cheque. The amount under the cheque arose out of that promise of the accused to return the value of the stock. That was a case of enforcement of a right arising out of such contract. That principle is not applicable to the facts of the present case.

10. The Supreme Court in the case of Kamal Pushpa Enterprises v. D.R. Construction Company ((2000) 6 SCC 659 : AIR 2000 SC 2676) has observed that the bar to enforce rights arising from contract under Section 69(2) of the Partnership Act applies only in respect of suits and not applicable to the proceedings before the Arbitrator. In a direct decision of this Court in Beacon Industries, Rep. by its Partners, Bangalore v. Anupam Ghosh (ILR 2003 KAR 4325) the observation of this Court is that an unregistered firm is barred from filing a civil suit, but that there is no bar to initiate a private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act.

11. The words, legally enforceable debt or other liability' used in the explanation to Section 138 of the Negotiable Instruments Act refer to the enforceability in law of the debt or the liability in question and have no reference to the right of the person enforcing ft. If there is no legal impediment for enforceability of a debt or other liability in general, disability of a particular individual or entity to enforce such right to recover such debt or liability does not render such debt or liability not legally enforceable debt or liability. The intention of the legislature is to make non-payment of amounts of cheques despite service of notice as per the provisions of the Act an offence only when the cheque has been issued for payment of a legitimate debt or liability. Amount required to be paid as price of articles or goods is a legitimate debt or liability and therefore it is a legally enforceable debt or liability. ***The disability of an unregistered firm under Section 69(2) of the***

Indian Partnership Act to file a suit to enforce a right arising out of a contract does not make such debt or liability a not legally enforceable debt or liability.*"*

9. However, in <u>*Amit Desai v. Shine Enterprises*</u> 2000 SCC OnLine AP 748 : 2000 Cri LJ 2386 Division Bench of Andhra Pradesh High Court taking a contrary view held:

> "*14. The learned counsel Mr. C. Padmanabha Reddy further relied upon a ruling reported in Kerala Arecanut Stores v. Ramkishore and Sons, AIR 1975 Kerala 144. Their Lordships of Kerala High Court were pleased to hold that a suit by a partner for recovery of money on dishonour of cheque endorsed in favour of the firm is not barred. The learned counsel further relied upon a ruling reported in Abdul Gafoor v. Abdurathiman, (1999) 2 Andh LT (Cri) 196. The learned single Judge of Kerala High Court was pleased to hold that Section 69(2) of the Partnership Act is applicable only where the civil rights are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. With due respect to the learned single Judge of Kerala High Court, we prefer to differ with the views expressed by him. Explanation to Section 138 of the Negotiable Instruments Act specifically laid down that the debt or other liability means a legally enforceable debt or other liability.* ***Enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in explanation (2) of Section 138 of the Negotiable Instruments Act.*** *Considering the above legal aspect, we hold that it is a fit case wherein this court can exercise the powers under Section 482, Cr. P.C. for quashing the criminal case. Accordingly we quash C.C. No. 88/97 which was filed against the petitioners herein and pending in the Court of the Judicial Magistrate of First Class Madanapalle. Thus, the Criminal Petition is allowed.*"

10. It is thus apparent that except the Division Bench of Andhra Pradesh High Court the view expressed by the three other High Courts is that the bar applicable under Section 69(2) of the Partnership Act would not operate in proceedings under Section 138 of the Negotiable Instruments Act.

11. Supreme Court in *BSI Ltd. (supra)* clarifying the distinction between criminal and civil proceedings noted that a criminal prosecution is neither for recovery of money nor for enforcement of any security, Section 138 of the NI Act is a penal provision convicting and sentencing an offender for commission of the offence on proof of the guilt established after a criminal trial. Section 138 of the NI Act notes as under:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless—
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of

> the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

12. It is thus apparent that on finding of the guilt arrived at by the criminal Court the accused is liable to a sentence of imprisonment which may extend to two years, or fine or with fine which may extend to twice the amount of cheque, or with both. Thus discretion is granted to the criminal Court to either award imprisonment or fine or both. Thus proceedings under Section 138 of the NI Act are not recovery proceedings and in a given case the criminal Court may only award sentence of imprisonment. Irrespective of a complaint proceeding under Section 138 of the NI Act, a creditor has the right to institute civil suit for recovery of his debt in which case the same would be recoverable only if it is a legally enforceable debt or other liability.

13. Following the decision of the Supreme Court in *BSI Ltd. (supra)* this Court is of the considered view that the decisions of the Kerala High Court, Karnataka High Court and Punjab & Haryana High Court as noted above lay down the correct law. Thus the issue raised by learned counsel for the petitioner that since the complainant respondent is not a registered firm it cannot maintain a complaint under Section 138 of the NI Act is rejected. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

JULY 07, 2017/'ga'